IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 861 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT and
MR.JUSTICE A.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

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MOIHAN PARSINH RATHVA

Versus

STATE OF GUJARAT

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Appearance:

MR PJ YAGNIK for Petitioner
PUBLIC PROSECUTOR for Respondent No. 1

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CORAM : MR.JUSTICE J.N.BHATT and
MR.JUSTICE A.K.TRIVEDI

Date of decision: 23/06/98

ORAL JUDGEMENT

(Per J.N.Bhatt,J)

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1. The appellant herein is the original accused No.1 tried with original accused No.2 in Sessions Case No.23/91 and found guilty by the Ld.Addl.Sessions Judge,

Baroda, camp at, Chhota Udepur, for the offences punishable under section 302 IPC and also under sections 27 & 30 of Arms Act, and he is sentenced to undergo imprisonment for life and also to pay Rs.1,000/- fine and in default to undergo further Rigorous Imprisonment for six months, and he is sentenced to undergo Rigorous Imprisonment for three months each under sections 27 & 30 of Arms Act. The appellant questioned the legality and validity of the order of conviction and sentence recorded on 25.10.1991 in Sessions Case No.23/91 by filing this appeal through jail. The appellant-accused is provided legal aid for his defence.

2. The appellant came to be tried by the trial court along with his son--original accused No.2 for the charges under section 302 read with 114 of IPC and sections 27 & 30 of Arms Act. The prosecution, interalia, alleged that the appellant on account of motive committed the offence of murder on 9.1.1991 at about 6.00 p.m. near the house of the deceased. The deceased--Nakudia, his wife and other family members were taking dinner on the date of the incident. At that time accused persons who are father and son came near the house of the deceased and original accused No.2 and abused the deceased and also pelted stones and thereafter he ran away. When the deceased came out of his house the appellant who armed with double barrel muzzle gun fired shot which hit the deceased Nakudia on the chest as a result of which he fell down in the vada portion. The deceased was also dragged to some distance and at that time he was not dead. Therefore, the accused persons had gone near house and beaten the deceased in the presence of widow of the deceased. Thereafter, the deceased came near the door and succumbed to said injuries.

3. The deceased was examined by the Medical Officer on being taken to the hospital where he was found dead. The incident occurred at a small village Sihada in Chhota Udepur taluka, District Baroda. The complaint was lodged at Chhote Udepur as there was no police station at Sihada. Upon investigation it was found that the double barrel muzzle loaded gun of the appellant was used in the commission of offence. That is how the appellant and his son came to be tried for the aforesaid charges. The trial court upon examining and appreciation of evidence on record found that the original accused No.1--appellant herein was guilty for the offence under section 302 and sentenced him to life imprisonment and also to pay Rs.1,000 in default to undergo further Rigorous Imprisonment for three months on each count which is challenged by the original accused in this appeal.

4. After having carefully examined the evidence of prosecution and after dispassionately hearing the Ld.advocate for appellant-original accused(appointed) and the Ld.APP we are of the opinion that the impugned order of conviction and sentence is quite justified and requires no interference for the reasons we hasten to articulate hereinbelow:

(i) The main PW 1--Kapariben, widow of deceased who is examined at Exh.8 is the eye witness. Her evidence is quite natural, untainted and trustworthy. Her evidence has remained totally unshaken. She has, unequivocally,
testified that the appellant-original accused No.1-Mohan had fired shot from his gun as a result of which her husband fell down and thereafter also he dragged when he was leaving by the accused. There is nothing to discord or disbelieve her version. She had lodged the FIR at the available police station at the earliest point of time, though it was after 8 hours.

(ii) The contention that PW1--Khapariben should not be relied on as she is interested and partisan witness is totally without any substance. She is the person interested in bringing the real accused to book and would not be interested to let-off the real assailant and implicate the innocent in a case like one on hand. It is not interestedness but the creditworthiness that ought to weigh with the court. Ordinarily in a serious offence like murder the close relations would be anxious to see that the real offender is brought to book and is punished. Therefore, merely she happened to be the wife of the deceased, it will not be an impediment in accepting her testimony which is otherwise noticed quite reliable and natural. She has given true account of an eye witness. No material discrepancy or irregularity is noticed in her evidence. Her presence in the house at the relevant point of time was also quite natural. Again, her evidence is fortified by her complaint which was lodged at the earliest point of time where Police Station was situated. Period of 8 hours in lodging the complaint from the time of incident and successfully established by the prosecution. Evidence of eye witness--Khaparibe is sufficient enough to transfix the culpability and also without any shadow of doubt. The trial court has, therefore, rightly placed reliance on her evidence. Simply because some other witnesses have turned hostile do not devalue or affect the merits of testimony of the complainant-Khapariben.

(iii) Not only that her evidence is fully supported by the medical evidence of PW6--Dr.Naliniben Jairaj Ahiar and the report of the Forensic Science Laboratory. It is clearly found from the report of the Forensic Science Laboratory that gun shots which culminated into last voyage of deceased-Nakudia were possibly by the double barrel muzzle gun produced at Exh.G whnich admittedly belonged to appellant for which he was holding licence. This medical evidence fully supports the version of eye witness and the positive report of Forensic Science Laboratory coupled with FIR at Exh.19.

(iv) The PW5--Hindu Nakudia--the minor son of deceased is examined at Exh.18. It is stated in his evidence that on hearing fire shots he came along with one Damsingh at his house and at that time he found his father lying on the floor. He found his father injured. Thereafter he along with his mother went to different persons and then for lodging the complaint. It is also noticed from his evidence that immediately after hearing fire shots he came to the venue of offence and remained with the mother.

(v) The manner and mode in which the fire arm, i.e. double barrel muzzle loaded gun was used by accused No.1 who happens to be ex-Surpanch who had enmity on account of political rivalry against the deceased and the manner in which the fire arm came to be used on the vital organ of the anatomy of the deceased which culminated into death of the deceased leaves no manner of doubt that the trial court has rightly held accused guilty for the offence under section 302 IPC as it was nothing but an attempt to kill and not caress.

5. After having considered the evidence of prosecution relied on by the trial court, the guilt of the accused for the offences punishable under section 302 IPC and also under sections 27 & 30 of the Arms Act, 1959 has been, successfully, established without any shadow of doubt. Accused No.2 came to be acquitted.

6. Before parting, we may place it on the record that though the appellant is found guilty for the offence punishable under section 27 of the Arms Act, he is sentenced to imprisonment of 3 months. However, section 27 of the Arms Act prescribes punishment for using arms under which minimum imprisonment is not less than 3 years which may extend to 7 years and also liability to fine. Even under section 27(2) if he is found guilty, he is liable for imprisonment for a terms which shall not be less than 7 years which may extend to imprisonment for

life and shall also be liable to find. It is not a case of possession of arms, it is the case of unauthorised use. Therefore, the sentence of imprisonment under section 27 of the provision has been lost sight. However, it shall pale into insignificance as the appellant is found guilty for the offences punishable under section 302 IPC and we confirm the order of conviction and sentence recorded by the trial court and the sentence under section 302 IPC and under sections 27 & 30 of Arms Act have been directed to run concurrently. Under the circumstances, it would not make practically any difference.

7. In view of the aforesaid facts and circumstances and the evidence of prosecution we are satisfied that the impugned order of conviction and sentence is quite justified and appeal is meritless and accordingly it is dismissed.